

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF OF PETITIONER
LYKES BROS. STEAMSHIP CO., INC.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,154

471

LYKES BROS. STEAMSHIP CO., INC., *Petitioner,*

v.

FEDERAL MARITIME BOARD AND UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of An Order of the
Federal Maritime Board

United States Court of Appeals
For the
District of Columbia Circuit

FILED

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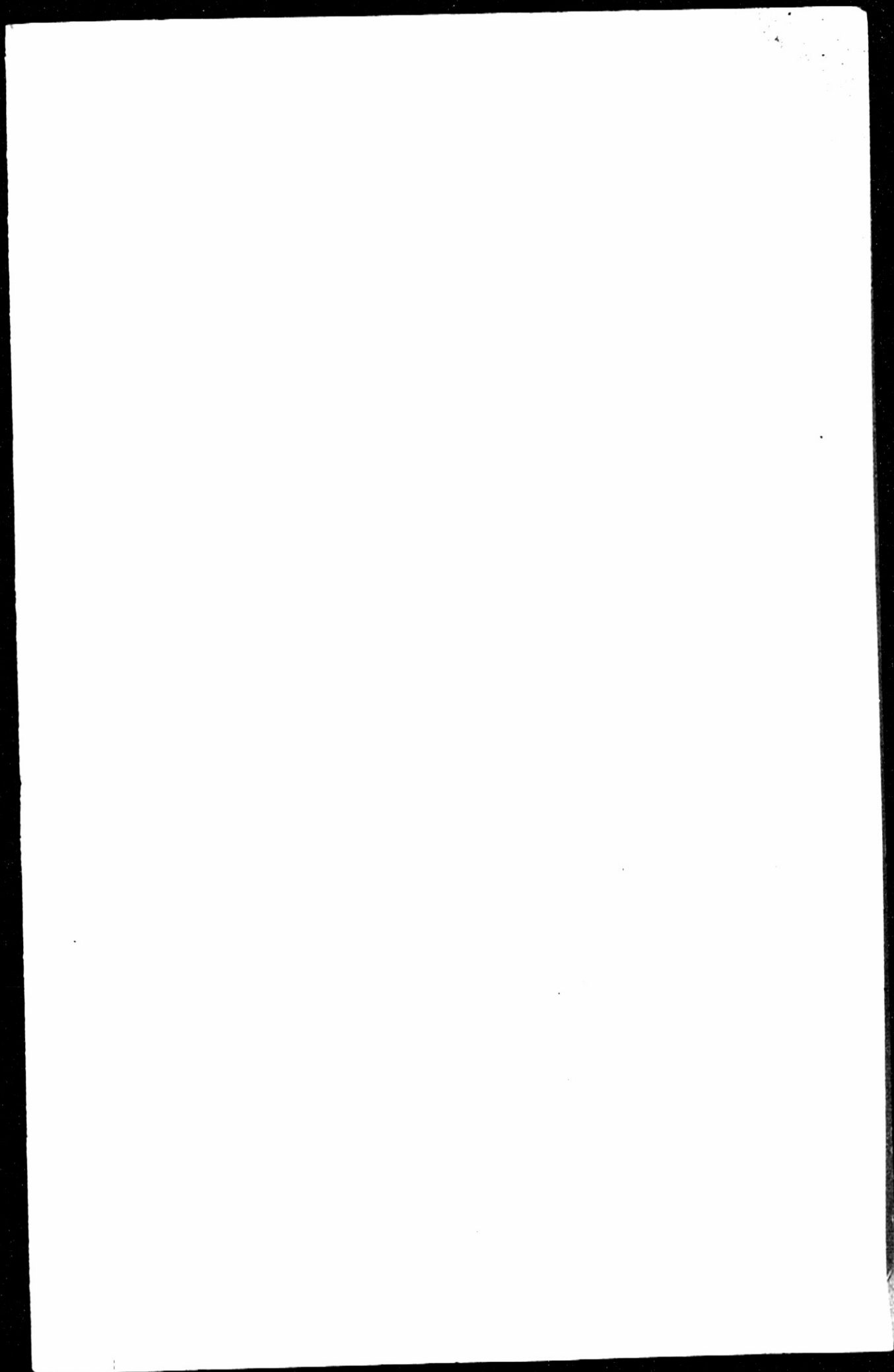
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November 21, 1961



STATEMENT OF QUESTIONS PRESENTED

In an investigation by the Federal Maritime Board of alleged violations of section 16 of the Shipping Act, 1916, as amended (46 U.S.C. § 815) relating to false classification of commodities, by a shipper, a forwarder, and certain common carriers by water, including this petitioner,

(1) Whether the Board correctly found that there was, in fact, a false classification of the commodities involved.

(2) Whether the Board correctly found that this petitioner, Lykes Bros. Steamship Co., Inc., allowed persons to obtain transportation for property at less than the regular rates by means of false classification, in violation of section 16, Shipping Act, 1916.

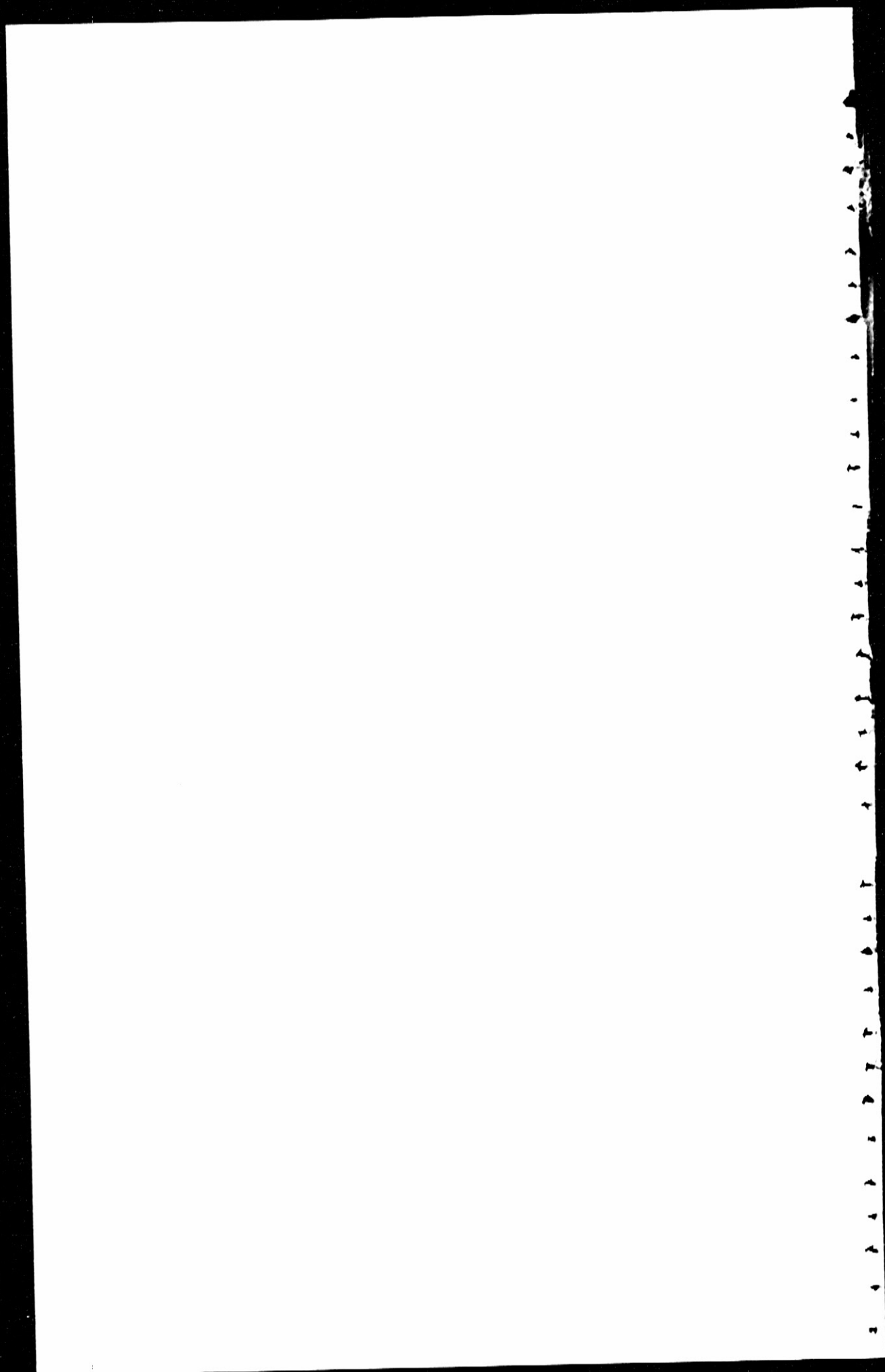


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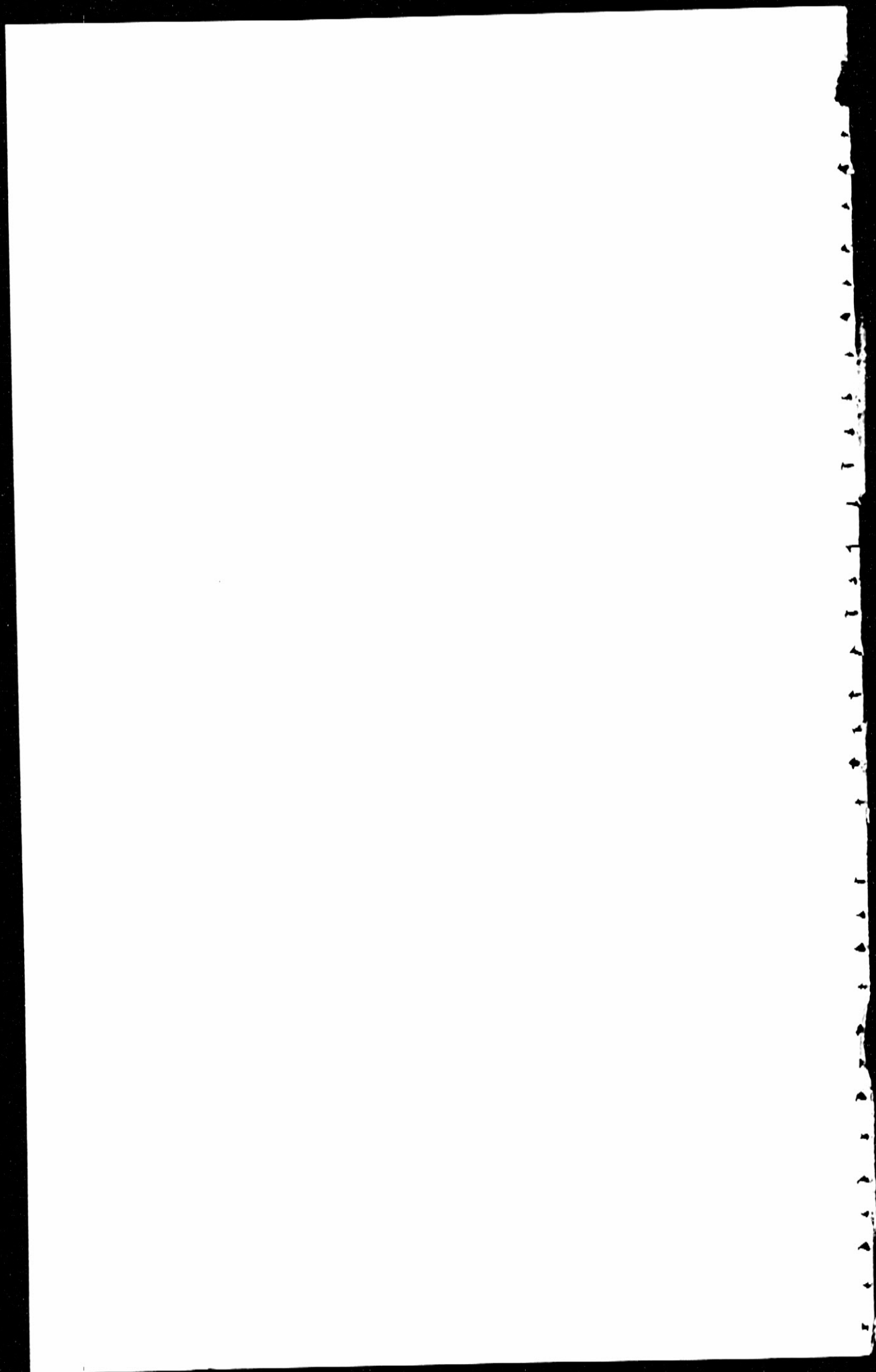
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BRIEF OF PETITIONER
LYKES BROS. STEAMSHIP CO., INC.

JURISDICTIONAL STATEMENT

This petitioner, Lykes Bros. Steamship Co., Inc., seeks review of a final order of the Federal Maritime Board dated November 21, 1960 (J. App. 458-459) in F.M.B. Docket No. 802 under the Shipping Act, 1916, as amended (46 U.S.C. §§ 801 et seq.). This court has jurisdiction under the Judicial Review Act of 1950, as amended (5 U.S.C. §§ 1031 et seq.).

STATEMENT OF THE CASE

This proceeding involves four petitions, consolidated for all purposes by order of the Court entered on March 16, 1961 (J. App. 498-499) to review a decision and order of the Federal Maritime Board ("Board") dated November 21, 1960 finding (1) that Bartlett-Collins Company ("Bartlett") and Houston Freight Forwarding Company ("Houston") violated section 16 of the Shipping Act, 1916, as amended ("Act") by obtaining between September 1955 and June 1956 transportation by water for glass tumblers and other manufactured glassware items from the United States to Venezuela at less than applicable freight rates through false classification; and (2) that this petitioner, Lykes Bros. Steamship Co., Inc. ("Petitioner", "Lykes") and two other common carriers by water, Royal Netherlands Steamship Company ("Royal Netherlands") and Compania Anonima Venezolana de Navegacion ("Venezuelan Line") violated section 16-Second of the Act by allowing Bartlett and Houston to obtain, through false classification, transportation of glassware at less than the applicable rates established and enforced by the carriers.

The investigation which culminated in the decision and order of November 21, 1960 was instituted by the Board upon its own motion by order dated September 20, 1956 (J. App. 2-4). The evidence was heard by the Board's Examiner, C. B. Gray, in March and June, 1959 at hearings held in Houston, Texas and Washington, D. C. Thereafter, on November 17, 1959, he issued a recommended decision (J. App. 406-419), holding that while Houston and Bartlett violated section 16 of the Act by misclassifying shipments of glass tumblers and other glassware items as empty glass jars, there was no evidence that petitioner or the other respondent carriers (Royal Netherlands and Venezuelan Line) allowed any person to obtain transportation for glassware items from the United States to Venezuela at less than their regular rates by means of false classification or other unjust or unfair device or means.

The investigation was directed to 44 shipments of glassware, manufactured by Bartlett and shipped for it by Houston, an ocean freight forwarder, from ports on the Gulf of Mexico to Venezuela between September 1955 and June 1956, on ships of petitioner and the two other respondent carriers, all being members of or associated with the United States Atlantic and Gulf—Venezuela and Netherlands Antilles Conference ("Conference"). The glassware items moved from Bartlett's factory in Oklahoma to a Gulf port by motor carrier, where Houston then forwarded them to Venezuela by water carrier (J. App. 414). Houston prepared the ocean bill of lading and the shipper's export declaration required to be filed with the U. S. Collector of Customs. Various bills of lading described certain of the glassware items as glass jars. The Examiner found that some of those descriptions were at variance with descriptions of the items as tumblers in the export declarations, the inland bills of lading and the loading tally sheets. He concluded from those variances that there had been misclassification of shipments by Houston, authorized by Bartlett, in order to obtain the lower tariff rate on glass jars. However, the classification as glass jars was based on information and instructions received by Bartlett and Houston that they were to be used as containers in the packaging of food and other commodities rather than as tableware. In addition, many of them were ring-gauged, indicating clearly that they were to be used as packers' items. Thus the nature and use of the articles as containers and not drinking glasses placed them in the category of jars and such classification was proper (J. App. 221-337).

The Examiner, although finding false classification by Houston and Bartlett, exonerated petitioner and the other carriers since there was no evidence that they "allowed" any person to obtain transportation for the commodities in question at less than regular rates by means of false classification. Petitioner had no actual knowledge of any mis-

classification, if there was, in fact, a misclassification. It had to rely on the classification of commodities as furnished by the shipper or his freight forwarder (J. App. 97-99). The ocean bills of lading were prepared by Houston in complete form, except for signature, numbering and dating, before they were issued by Lykes (J. App. 418). There was no legal nor company requirement (and perhaps not even a legal right) to compare the export declarations with the bills for possible variances in commodity descriptions, and even if such comparisons had been made, the differences were not of such a nature as to put a non-expert bill of lading clerk on notice of a misclassification. In this regard, Schedule B, which governs the classification of commodities in the export declarations, is not a tariff and the descriptions in one do not always conform to those in the other (J. App. 102). In addition, the declaration sometimes did not accompany the bill of lading and therefore the two documents were not necessarily in Lykes' possession at the same time (J. App. 93).

Lykes did not physically inspect the cargo (J. App. 98-99). Even if the cargo packages had been opened, there was no one in petitioner's organization sufficiently expert in the glass trade to distinguish between a jar and a tumbler (J. App. 107-109).

Lykes, in short, had no knowledge nor reason to suspect that there might be a misclassification. Like so many commodities transported by carriers where the particular nature of the items is not apparent to the layman, it had to rely on the shipper's description. It had no duty to take any further steps with regard to the shipments in question, steps which in any event would have been impracticable as well as ineffective.

The Board disregarded the foregoing facts and overruled the Examiner's recommendation that Lykes and the other respondent carriers should be found not to have violated the Act. After adopting the Examiner's view that

there had been false classification of the commodities by Bartlett and Houston, it found that the carriers, although lacking any knowledge of misclassification, violated section 16-Second of the Act by "allowing" the shipper and forwarder to obtain transportation at less than applicable rates by means of such practice (J. App. 435-457).

STATUTES INVOLVED

The statute involved is section 16 of the Shipping Act, 1916, as amended (46 U.S.C. § 815). That section is set out in Appendix A hereto.

STATEMENT OF POINTS

POINT I. The Board erred in finding a misclassification of the products described in its decision and order of November 21, 1960.

POINT II. The Board erred in finding that Lykes "allowed" persons to obtain transportation of glassware products for less than the regular rates or charges by means of false classification.

SUMMARY OF ARGUMENT

1. *Misclassification.* This question will be dealt with in the brief of Bartlett, the petitioner in No. 16224, and Lykes relies principally upon that presentation to show that there was no misclassification. There is no substantial evidence in the record to support a finding that the products in question were tumblers rather than jars. The only witness who testified that they were tumblers was not an expert, whereas an expert witness testified that they were properly classified as jars. In addition, the purpose for which the items were to be used, namely containers for packaging, showed them to be jars.

Continental Can Company v. United States of America and Federal Maritime Board, 272 F. 2d 312 (2d Cir. 1959) involved the same tariff and the same products as the

present proceeding. The decision in that case exonerating the shipper supports Lykes' position on the question of misclassification and the disagreement among the judges shows the difficult task confronting a carrier with respect to classification of these glassware items.

2. *The carrier's role in classification.* Lykes does not employ a glass expert and with regard to the glassware items in question, like countless other products, it must rely on the classification furnished by the shipper or his forwarder. Here the bills of lading containing the alleged false classifications, were prepared by Houston.

Although in several instances there were variations between the product classification in the export declaration (also prepared by Houston) and in the bills of lading, they were not of such a nature as to put a non-expert bill of lading clerk on notice of misclassification. *Rates, Charges and Practices of Carriers, and Practices of Shippers, in Connection with Freight Traffic from United States to Philippine Islands*, No. 585, 2. U.S.M.C. 535 (1941), in which comparison of bills of lading with export declarations was discussed by the Maritime Commission, is clearly distinguishable from the the present proceeding.

It is questionable whether, under the language of Circular Letter No. FT-111, the carrier was legally privileged to compare the export declaration description with the bill of lading description. In addition, Schedule B, on which the export declaration descriptions were based, is designed for statistical purposes and not for tariff or bill of lading purposes. A correct Schedule B description and a correct tariff description of the same item could vary considerably and yet both be correct. The report of the Board acknowledge this and stated that it was "entirely possible to check a declaration against a bill of lading and not find an inconsistency when in fact there is a false classification."

The Board's finding that Lykes violated the Act seems to be based upon two erroneous premises: (1) that a comparison of the export declarations and the bills of lading would have disclosed false billing; and (2) that Lykes was remiss in failing to open any of the packages. With regard to the latter, petitioner had no legal right to open packages tendered to it by a shipper and even had they been opened, there was no one at Lykes sufficiently expert in the glass trade to tell whether the items were tumblers or jars. With regard to the first premise, there is no legal duty to check export declarations against bills of lading. Nor is there any evidence in the record that any of the export declarations and corresponding bills of lading were in Lykes' possession at the same time, or were checked against each other.

Lykes' office procedures were the normal ones followed in any shipping office and the discrepancies between the export declarations and bills of lading, even if they had been noted, were not such as to arouse suspicions of misclassification.

The lack of any reason for suspecting false classification, together with the necessity of relying upon the assurances of the shipper as to the nature of a technical product of this kind, absolve Lykes of any intent to apply an improper rate and of any wanton disregard of duty.

ARGUMENT

Fundamentally, this matter involves decision on two points. The first is whether there was a misclassification of the products involved and only in the event it is found that there was a misclassification, will the second point, the carrier's responsibility therefor, be reached.

We take the position that there was, in fact, no misclassification. It is our understanding that the matter of classification will be dealt with extensively by Messrs. Mueller & Mueller, attorneys for Bartlett-Collins Company, Peti-

tioner in No. 16,224, and in order to shorten the record as much as possible, we will rely heavily upon their presentation to show that there was no misclassification.

In the first place, there is absolutely no substantial evidence in this entire record to support a finding that the products in question were tumblers rather than jars. The only witness who testified that the goods were tumblers was the Customs Inspector, Robert N. Womack (J. App. 27-64), who admittedly was not an expert. On the contrary, the evidence of James C. McReynolds was that of an expert and he clearly, categorically and convincingly testified that the material was properly classified as jars and not as tumblers. (J. App. 221-337).

There is not a single word of evidence in this entire record that any of the products covered by any of the exhibits introduced in this case were ever used for any purpose other than the packaging of food and other material. The evidence here shows that many of the shipments were ring-gauged, which could only mean that they were to be used as packer's items. Thus we say that in the absence of any evidence whatsoever of any use other than as may be implied from the fact that some of the shipments were ring-gauged, there can be no finding of any use of the items here in dispute other than as jars.

We feel that our position is completely supported by the decision of the Court of Appeals for the Second Circuit in *Continental Can Company v. U. S. and Federal Maritime Board*, 272 F. 2d 312 (2d Cir. 1959), sometimes referred to as the Hazel-Atlas case. The same tariff and the same products involved in this case were involved there. Three opinions were written. Judge Moore found no misclassification. Judge Smith (D.J) found misclassification but no violation of the Act. Judge Clark found both misclassification and a violation. The shipper was exonerated. Carriers were not involved. We refrain from quoting the highly applicable opinion of Judge Moore as the Court

will no doubt wish to read all of the opinions. It strikes us that if those three learned Judges could not agree upon the proper classification, that certainly a carrier should not be brought to task for its failure to classify the items as tumblers. It must also be borne in mind that before the *Continental Can* case was decided, the Court was fully advised concerning the products there involved, an opportunity not available to a carrier.

With every belief that the shipments in question were properly classified and that such a finding should end the case, we pass to the carrier's role in classification in the event we are mistaken.

Lykes does not employ a glass expert and in the case of the shipments here involved, as in the case of countless other products, it must rely upon the classification of the goods as furnished by the shipper directly or through his freight forwarder. The record shows without dispute that the bills of lading introduced in this case were all prepared by the Houston Freight Forwarding Company. Mr. Berkefeld, who appeared as a witness for Lykes, testified more than once that he did not know a tumbler from a jar and could do nothing other than rely upon the shipper's description. He testified that he would not have known the proper classification had he had one of the objects in question before him. Therefore, if he had made any further inquiry as to what the objects were, the normal and logical source of information would have been the manufacturer, and from the testimony of McReynolds it is quite clear that had inquiry been made of him, he would have advised the carrier that the products were jars.

Actually, Lykes did not know what was in the various cartons that were being carried, which is the rule rather than the exception in dealing with a large variety of products.

Certainly if the end use of the product (concerning which there is no testimony in the record) is of any value

in determining the proper classification, Lykes had absolutely no knowledge of such end use.

The sole evidence that we can find in the record that would in any manner involve the carrier in any misclassification is the fact that in several instances there were variations between the product classification in the export declarations and in the bills of lading. However, those differences were certainly not of a nature as to put a non-expert bill of lading clerk on notice of a misclassification. As we see it, a failure to compare the descriptions in the export declarations and the bills of lading is of importance only because of certain language found in *Rates, Charges and Practices of Carriers, and Practices of Shippers in Connection with Freight Traffic from United States to Philippine Islands*, No. 585, 2 U.S.M.C. 535 (1941), which involved textile traffic to the Philippine Islands. We cannot go along with all that was said about the comparison of bills of lading and export declarations in that decision, but that case is certainly distinguishable from the present case for many reasons. In the first place, in the textile case there was no doubt as to misclassification, which would have been obvious to any layman. However, in the textile case it appears that the carriers there involved required the shippers to file a copy of the export declaration before a bill of lading would be issued. Such is not the case here, as is shown by the uncontradicted testimony of Berkefeld (J. App. 92-95). The export declarations and the bills of lading are not necessarily in the hands of the steamship company at the same time. The purpose of the carrier in having the export declarations in its hands at any time has no relationship to the bill of lading. It is more or less a service performed by the carrier for the Bureau of the Census, as the export declarations must be attached to the outward foreign manifest.

It is also shown in the textile case that the carriers had actual knowledge of the misclassifications through the necessity of amending the ship's manifests at Manila,

while here, prior to the time this investigation was launched, there was nothing whatsoever to call the carrier's attention to even the possibility of a misclassification.

It is also noteworthy that in the textile case there were "numerous exhibits and extensive testimony" showing that the question of classification had been discussed between shippers and the respondent carrier's conference organization.

It is somewhat doubtful whether the carrier was legally privileged to compare the export declaration description with the bill of lading description. Circular Letter No. FT-111, page 98 of Exhibit 86, reads in part as follows:

"For shipments by vessel, present procedures require that a copy of the shipper's export declaration be presented by the exporter or his agent to the exporting carrier for the purpose of preparing and checking the completeness of the vessel's manifest. In addition, export control regulations require the presentation of the export declaration as part of the export control regulatory procedures.

"In this connection, the attention of all persons concerned is called to the fact that the shipper's export declaration may not be used for other than the above purposes."

There is certainly no connection between checking the completeness of a vessel's manifest and checking the export declaration against the bill of lading for commodity description.

It is also interesting to note from Exhibit 86 that the Bureau of the Census has had a great deal of difficulty in educating shippers as to the proper classification of commodities in accordance with Schedule B. The use of different classifications or commodity descriptions would seem in many instances to be a matter of discretion in borderline cases.

It must be borne in mind that Schedule B is not a tariff. In many instances it contains descriptions not found in the tariffs involved in this case and the tariffs contain descriptions not found in Schedule B. Neither Schedule B nor the regulations of the Bureau of the Census have anything to do with freight rate classification or commodity description or bill of lading description. Schedule B is designed solely for statistical purposes and a correct Schedule B description and a correct tariff description of the same item could vary considerably and yet both still be correct.

The introduction to Schedule B itself indicates the difficulty in proper commodity classification. In Item 28, the following is found:

“A substantial proportion of shippers' export declarations are prepared by clerks or other non-technical employees of the export houses, freight forwarders, etc., who must rely on the designation of the commodity appearing on commercial papers such as invoices and who cannot be expected to know in all cases the detailed technical specifications of products solely designated by trademarks or trade names in such commercial papers.”

We believe that it clearly appears that here the carrier could do nothing other than as it did. It could not make a distinction between a tumbler on the one hand and a jar on the other and of necessity was forced to rely upon the shipper's description just as instructed to do by that portion of the introduction to Schedule B quoted above, and as it must do in all cases where the nature of the goods are not apparent to a layman. Even today, after the extensive hearings held in this case, could the carrier properly say what was a tumbler and what was a jar? Here we have several hundred pages of testimony on the point with vigorous and able counsel taking opposite positions and concerning a matter about which even members of our respected judiciary do not agree.

It is difficult to tell just what the Federal Maritime Board either found or intended to find against Lykes. That part

of its report dealing with the carriers (J. App. 446-454) seems to start with the premise that the Board must find Lykes in violation and proceeds in a roundabout manner to try to justify that holding.

At the outset, the Board, in construing section 16, says:

1. That intent is an essential element to the establishment of a violation of section 16-Second;
2. That there must be an unlawful allowing "by unjust or unfair device or means";
3. That a "device" must be a willful, knowing scheme or means to an end;
4. That a carrier does not violate section 16-Second by inadvertence unless the evidence reveals such a wanton disregard of the duty to exercise reasonable diligence to collect applicable rates and charges for transportation as to amount to an intent to collect less than the applicable rates and charges.

Having set the foregoing out as the standards by which to judge the conduct of Lykes, the Board then, among other things, devoted considerable space to the inspection of a shipment of cargo destined for the SS FRED MORRIS in June of 1956. That shipment was no doubt investigated by the Bureau of Customs as a result of a complaint made by someone which ultimately led to these proceedings. Why this is of any consequence we do not know, since the Board itself stated "There is no evidence that any employee of Lykes was present, saw any of these actions or articles removed, or received a copy of the inspector's report." It is also interesting to note that the shipment inspected by Customs was the very last shipment involved in this case.

The report of the Board also admits that the descriptions found in the export declarations and the tariffs are not necessarily the same and that it was "entirely possible to check a declaration against a bill of lading and not

find an inconsistency when in fact there is a false classification."

Basically, the Board's opinion seems to be based upon the fact that a comparison of the export declarations and the bills of lading would have disclosed false billing, which is not at all true. The other, a point mentioned more than once in the Board's report, is that Lykes failed to open any of the packages. As to this position, there are two quick and clear answers. The first is that the carrier has no legal right to open packages tendered to it by a shipper and the second is that even had the packages been opened, the record is clear and uncontradicted, and, in fact, mentioned in the Board's report, that there was no one in Lykes' organization sufficiently expert in the glass trade to tell whether the items were tumblers or jars.

There is no legal compunction upon the carrier to check export declarations against bills of lading, all of which are prepared by the freight forwarders, and there is no evidence in this record that any of the export declarations and bills of lading covering any of the shipments that went by Lykes' vessels in this case were ever in the possession of the carrier at the same time or were ever checked one against the other. Be that as it may, it is going too far to say that a bill of lading clerk should have been aware from the differences in the export declarations and the bills of lading that there was a misclassification.

The Board concludes "As a result of (a) ineffective office procedures, (b) total reliance on shippers for discovery of the truth, and (c) failure to inspect cargo when alerted, we find the carriers have allowed Bartlett to obtain transportation of glassware at less than the applicable rates established and enforced by them."

We say there is no basis for any of these conclusions. The office procedures were the normal, ordinary office procedures in any shipping office and the discrepancies between the export declarations and the bills of lading, even

had they been noted, were not of a type that would have made anyone suspicious as to whether there was a misclassification.

At to item (b), we know of no better source when dealing with a technical object of this kind than to ask those skilled in the particular trade as to the nature of the commodity and, in the absence of any reason to be suspicious, and there was none here, certainly the carrier is entitled to rely upon the assurances of the shipper without coming within the test laid down by the Board of an intent to apply an improper rate or to be guilty of a wanton disregard of duty.

We have already mentioned the matter covered in (c), that is, the failure to inspect the cargo, which the carrier has no legal right to do. However, the Board's finding goes further than failure to inspect; it says "failure to inspect cargo when alerted." Lykes was not alerted until the last shipment that is involved in this case was inspected by Customs on June 28, 1956, and that ship, the SS FRED MORRIS, had long since sailed prior to the issuance of the Customs report under date of July 18, 1956.

Under this record, we do not believe it should be said that Lykes Bros. Steamship Co., Inc., allowed a person or persons to obtain transportation for property at less than the regular rates or charges then established and enforced by the carrier by means of false billing, false classification or by other unjust or unfair device or means, and we respectfully request the Court to so hold.

Respectfully submitted,

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November 21, 1961

APPENDIX A

Section 16 of the Shipping Act, 1916, reads as follows:

"It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

"Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense."

Certificate of Service

I hereby certify that I have served the foregoing brief on all parties to this proceeding by mailing copies to them as follows:

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